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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

NO. 75-1343

ALBERT ARTHUR QUIROZ, Petitioner,

-vs-

STATE OF ARIZONA, Respondent.

RESPONSE TO PETITION FOR
WRIT OF CERTIORARI

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OPINION BELOW AND JURISDICTION

Petitioner's conviction and sentence were affirmed by the Supreme Court of the State of Arizona on November 19, 1975. A motion for rehearing was denied on December 23, 1975, and an order affirming judgment was entered. Respondent adopts petitioner's jurisdictional statement.

STATEMENT OF THE CASE

Petitioner was charged by indictment with the unlawful sale and transportation of marijuana in violation of Ariz.Rev.Stat.Ann. § 36-1002.07. As the result of a plea bargain, the sale charge was dismissed in return for petitioner's plea of guilty of transportation entered on December 4, 1973. A presentence report was filed with the court, and on February 4, 1974, petitioner was sentenced to a term of from five to eight years in prison.

A motion to vacate the sentence was filed on February 8, 1974, based on specified

assertions of error in the probation officer's report. Execution of sentence was temporarily stayed, and hearing on the motion set for February 19, 1974. The hearing consisted of extensive testimony over three days from eighteen defense witnesses (including Mr. William Ryerse, author of the presentence report). Also, the supplemental presentence report and addendum thereto were marked as exhibits at the hearing. Cross-examination of Mr. Ryerse was partially based on these reports.

On March 5, 1974, the matter was submitted, and two days later the court ruled that the petition to vacate sentence be granted and the sentence reduced to a prison term of not less than 5 years and not more than 5 years and 1 day. (Minute Entry, March 7, 1974.)

The unreported memorandum decision of the Supreme Court of the State of Arizona correctly sets forth the facts of the case

and issue on appeal, and that decision is hereby adopted as if set forth in full herein. (See Appendix C of the Petition for Writ of Certiorari.)

REASONS WHY THE WRIT SHOULD NOT ISSUE

I

STATEMENT OF ISSUE

THE SENTENCE IMPOSED UPON PETITIONER WAS IN FULL COMPLIANCE WITH THE DUE PROCESS GUARANTEES OF THE FOURTEENTH AMENDMENT.

Petitioner presents a four-part argument challenging the validity of the modified sentence imposed on petitioner on March 7, 1974. The modification resulted from petitioner's motion to vacate sentence filed on February 8, 1974, four days after he was initially sentenced to serve 5 to 8 years in the Arizona State Prison for transporting marijuana, in violation of Ariz.Rev. Stat.Ann. § 36-1002.07.

Subsection 8 of petitioner's motion to

vacate this sentence read as follows:

> "It appears that Mr. Ryerse or someone unknown to the petitioner went far afield from the four corners of the probation reports furnished to defense counsel and orally informed the Court of things that require further investigation and foundation to test their truth or accuracy."

It is this allegation in addition to several summary statements in the presentence reports filed with the sentencing court that constitutes the crux of the petition.

Respondent does not dispute the principles of United States v. Weston, 448 F.2d 626 (9th Cir. 1971) and Williams v. New York, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949), relied on by petitioner. In fact, it is these principles that uphold the ruling of the Arizona Supreme Court herein.

Respondent takes issue, however, with petitioner's application of the facts of this case to the holdings of Williams and Weston, supra. Petitioner attempts to analogize this case with the Weston situation. However,

Weston differs from Williams in that Weston vigorously denied the accuracy of the charges made in the probation report and objected to the judge's consideration of them without more substantiation. A confidential report was submitted to the trial court purportedly corroborating the statements made against Weston in the original presentence report. The trial court accepted the additional information as sufficient corroboration, and sentenced Weston to the maximum term. The Ninth Circuit Court of Appeals disagreed with the lower court and vacated the sentence.

In holding that Williams, supra, is still good law, the Ninth Circuit requires more than unreliable hearsay constituting broad charges without some factual basis. The charge of Weston's involvement with heroin traffic was a detailed part of the presentence report (listing places, amounts of money, frequency of sales, etc.). However, the source of this uncorroborated evidence

presented the sentencing judge was only the opinion of unidentified personnel in the Bureau of Narcotics and Dangerous Drugs and the unsworn statement of one agent that an informer had given him some information lending potential support to the charge. In the spirit of the principles set forth in Williams, supra, the Weston court could not accept such bare-bones hearsay to support a maximum penalty.

The opportunity given Weston, upon vacation of sentence, to rebut the broad allegations of the report was likewise granted in petitioner's case. The testimony elicited during an extensive post-sentence hearing resulted in a modification of sentence. The principles of both Williams and Weston were adhered to in this case. The three day hearing on Petitioner's motion to vacate sentence consisted of testimony from 18 witnesses, including the author of the pre-sentence report (Mr. Ryerse), and one of petitioner's codefendants. The general

statements included in the report were discussed at length, and Ryerse cross-examined extensively. The trial court became fully apprised of the facts surrounding petitioner's participation in the trafficking of drugs and his involvement in this one particular transaction. The opportunity initially denied Weston was granted in this case.

Pursuant to Arizona law at the time of the report, Ryerse excised certain portions from the report as obtained under a promise of confidentiality and part of an on-going police investigation. (R.T., March 5, 1974, at 10, 12.) The court agreed to protect this confidentiality, and sustained several objections to questions concerning the source of Ryerse's information. (R.T., February 19, 1974, at 52, 59-60, 67, 69-70.) [This principle of confidentiality was recognized in State v. Kunz, 259 A.2d 895, 55 N.J. 128 (1969), a case heavily relied upon by petitioner.]

In State v. Pierce, 494 P.2d 696, 108

Ariz. 174 (1972), the Arizona Supreme Court adopted the American Bar Association's Standards for Criminal Justice Sentencing Alternatives and Procedures § 4.4(b), which states in part " . . . the court should be permitted to except from disclosure . . . sources of information which have been obtained on a promise of confidentiality". The further requirement that the court state for the record the reasons for not disclosing certain parts of the report was followed in this case. (R.T., February 19, 1974, at 52.) As stated by the Arizona Supreme Court in its decision on this appeal, " . . . we believe that the reasons given by the court for excising a part of the presentence report were adequate".

It should be pointed out, however, that in spite of sustaining the aforementioned objections to questions of Ryerse, the sought-after information was elicited during the course of the hearings. Ryerse stated that the source of his information was two

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prosecutors in the county attorney's office. (R.T., February 19, 1974, at 50.) A further basis of the challenged statements by Ryerse were remarks by petitioner to Ryerse and the police as to his involvement in a narcotics "ring". (R.T., February 22, 1974, at 9-10.) Ryerse testified that he also considered the grand jury transcript; statements made to him by codefendant Stadie as to large amounts of marijuana seen in petitioner's house; and information provided in discussions with petitioner's first defense attorney as to petitioner's social involvement with "organization" people. (R.T., March 5, 1974, at 20-23, 83.)

Ryerse further stated, and most crucial to a determination of petitioner's motion to vacate, that he had no specific information of petitioner's involvement with any specific narcotics offenses. (R.T., March 5, 1974, at 27-28.) The court was thereby aware of the strength of the statements made in the presentence report. Through an effective

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examination of Ryerse, plus the testimony of codefendant Maytoreno exculpating petitioner, (R.T., March 5, 1974, at 54, 58-59, 61), and petitioner's own admission of limited participation, the sentence imposed on February 4, 1974, was reduced on March 7, 1974, to the minimum statutory prison term (five years to five years and one day). Although the lower court did not specify its reasons for modification, it is obvious from the nature of the proceedings and testimony adduced therein that petitioner's classification as a member of a large-scale criminal enterprise was undermined and diminished. There is no evidence in this case that the sentence was predicated on false information [as prohibited by Townsend v. Burke, 334 U.S. 736, 68 S.Ct. 1252, 92 L.Ed.1690 (1948)]. Any misstatements or inaccurate implications contained in the presentence report were rectified at the hearing on petitioner's motion.

Williams v. New York, supra, and its

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progeny, support the proceedings herein as consistent with the due process standards of the Fourteenth Amendment. Williams held that due process does not require that information relied upon in sentencing must be restricted to that given in open-court by witnesses subject to cross-examination. Williams has been relied on by a number of courts in holding that evidence of other criminal conduct not resulting in a conviction may be considered in imposing sentence. Jones v. United States, 113 U.S.App. D.C. 233, 307 F.2d 190 (1962); United States v. Doyle, 348 F.2d 715 (2nd Cir., 1965); United States v. CiFarelli, 401 F.2d 512 (2nd Cir., 1968); United States v. Marcello, 423 F.2d 993 (5th Cir., 1970); United States v. Onesti, 411 F.2d 783 (7th Cir., 1969); United States ex rel. Long v. Pate, 418 F.2d 1028 (7th Cir., 1969).

The Weston court stated that "We do not desire to transform the sentencing process into a second trial, and we believe that other

criminal conduct may be properly considered, even though the defendant was never charged with it or convicted of it" (448 F.2d at 633). Evidence in this case of other criminal conduct was mitigated and the modified sentence imposed thereafter.

As stated in Williams, supra, a sentencing judge is not confined to the narrow issue of guilt. Highly relevant -- if not essential -- to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. The rigid adherence to restrictive rules of evidence properly applicable to trials does not apply to the sentencing aspect of criminal justice. "The due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure". Williams, supra, 337 U.S. at 251.

Petitioner's reliance on State v. Kunz, supra, is misleading. Kunz involved a

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substantive change in New Jersey's sentencing procedure whereby presentence reports would now be disclosed to the defense. Prior to Kunz, the report or any part thereof was only available to the trial court. Such was not the case herein.

The State of Arizona, in adhering to the Williams rationale was correct in upholding the sentence imposed by the trial court. State v. Benge, 520 P.2d 843, 110 Ariz. 473 (1974); State v. Dixon, 21 Ariz.App. 517, 521 P.2d 148 (1974). The Arizona Supreme Court, in disposing of this issue best summarized the case in stating that:

> ". . . we have read the excised portion of the presentence report and while we find that it expresses the bias of the probation officer, we do not find any factual allegations which were not met in the extensive cross-examination of the probation officer and his arguments to the court."

The gist of petitioner's argument is an assertion that "he presented a strong case for probation". (Petition for Writ of Certiorari, at page 6.) This argument is

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without merit in fact or in law. It is well settled that probation is not a matter of right, nor is the trial judge required to spell out its reasons for either granting or denying probation. State v. Becerra, 534 P.2d 743, 111 Ariz. 538 (1975). Furthermore, there is no requirement that a first offender be given a minimum sentence. State v. Cortez, 408 P.2d 410, 2 Ariz.App. 306 (1965). The penalty imposed in this case falls within the limits of the statute (five years - life), and does not clearly appear to be excessive.

CONCLUSION

Respondent submits that petitioner was afforded full due process in the trial court. The modification of sentence to the minimum statutory period speaks for itself. Petitioner's allegations criticizing particular statements in the presentence report were fully investigated and aired in open-court, resulting in an informed

sentencing court. The thrust of his petition is an attempt to argue the merit of probation as opposed to prison time. That determination is a matter of trial court discretion, and in the absence of abuse should remain undisturbed.

RESPONDENT RESPECTFULLY submits that the Petition for Writ of Certiorari herein should be denied.

Respectfully submitted,

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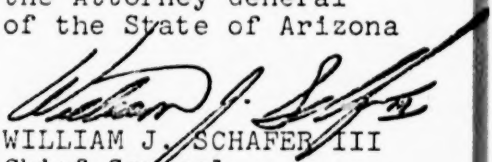

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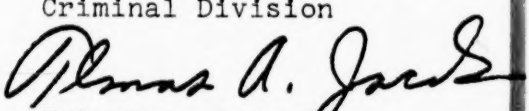

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